83-17

No.

In the

Supreme Court of the United States

OCTOBER TERM, 1983

DONNA COCKRUM and LEON COCKRUM,

vs.

DR. GEORGE BAUMGARTNER and UNKNOWN LABORATORY,

Respondents.

and

EDNA RAJA and AFZAL RAJA,

Petitioners,

vs.

MICHAEL REESE HOSPITAL AND MEDICAL CENTER,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS AND APPENDIX

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QUESTIONS PRESENTED

1. Whether the Illinois Supreme Court's pronouncement that, because of the State of Illinois' articulated policy against abortion, negligent physicians and hospitals are excused from liability *per se* for certain damages, including the cost of rearing and educating a child born as a direct and proximate result of medical malpractice, poses an unconstitutional burden on a potential parent's right to privacy and right to family plan without undue governmental intrusion.

2. Whether a public policy pronouncement of the Illinois Legislature, cited with approval by the state courts of Illinois, which is in direct conflict with rights defined in the United States Constitution, violates the Supremacy Clause of the United States Constitution.

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

Petitioners pray that a Writ of Certiorari issue to review the Order of the Supreme Court of Illinois denying a rehearing entered April 8, 1983.

OPINIONS BELOW

The order of the Supreme Court of Illinois, with respect to which review is sought, denying a rehearing, is unreported. It is printed in the Appendix hereto at App. D. The opinion of the Supreme Court of Illinois with respect to which the rehearing was denied is reported at .....Ill.2d....., 447 N.E.2d 385. It is printed in the Appendix hereto at App. C. The opinion of the Appellate Court of Illinois, which the Illinois Supreme Court reversed, is reported at 99 Ill.App.3d 271, 425 N.E.2d 968. Said opinion is printed in the Appendix hereto at App. B. The order of the Circuit Court of Cook County, Illinois, from which appeal was taken and which was affirmed by the order of the Supreme Court of Illinois, is not reported. It is also printed in the Appendix hereto at App. A.

JURISDICTION

Jurisdiction is based on 28 U.S.C. §1257(3). The order sought to be reviewed was entered April 8, 1983.

STATUTES INVOLVED

Ill. Rev. Stat. (1977), Chap. 38, §81-21: "Legislative Intention.

> It is the intention of the General Assembly of the State of Illinois to reasonably regulate abortion in conformance with the decisions of the United States Supreme Court of January 22, 1973. Without in any way restricting the right of privacy of a woman or the right of a woman to an abortion under those decisions, the General Assembly of the State of Illinois do solemnly declare and find in reaffirmation of the longstanding policy of this State, that the unborn child is a human being from the time of conception and is, therefore, a legal person for purposes of the

unborn child's right to life and is entitled to the right to life from conception under the laws and Constitution of this State. Further, the General Assembly finds and declares that longstanding policy of this State to protect the right to life of the unborn child from conception by prohibiting abortion unless necessary to preserve the life of the mother is impermissible only because of the decisions of the United States Supreme Court and that, therefore, if those decisions of the United States Supreme Court are ever reversed or modified or the United States Constitution is amended to allow protection of the unborn then the former policy of this State to prohibit abortions unless necessary for the preservation of the mother's life shall be reinstated."

Ill. Rev. Stat. (1979), Chap. 38, §81-21:

It is the further intention of the General Assembly to assure and protect the woman's health and the integrity of the woman's decision whether or not to continue to bear a child, to protect the valid and compelling State interest in the infant and unborn child, to assure the integrity of marital and familial relations and the rights and interests of persons who participate in such relations, and to gather data for establishing criteria for medical decisions. The General Assembly finds as fact, upon hearings and public disclosures, that these rights and interests are not secure in the economic and social context in which abortion is presently performed.

CONSTITUTIONAL PROVISIONS

U.S. CONST., Amend. XIV §1

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST., Art. VI, §2.

> This Constitution, and the laws of the United States, which shall be made in pursuance thereof shall be the supreme law of the land, and the judges in every State shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding . . .

U.S. CONSTITUTION, Amend. IX

> The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

STATEMENT OF THE CASE

The instant cases of *Cockrum* and *Raja* were consolidated by the Appellate Court of Illinois on appeal. The complaint in *Raja* alleged a negligent failure to diagnose the female plaintiff's pregnancy. The complaint in *Cockrum* alleged a negligent failure to perform a proper vasectomy on the male plaintiff, both acts of alleged malpractice resulting in the birth of unwanted children. In both cases plaintiffs alleged that, but for the negligence of the respective defendants, each of the female plaintiffs would not have borne a child. In both actions, plaintiffs sought to recover damages for the pain of childbirth, the time lost in having the child, the medical expenses involved, and the future expenses of raising the children to majority. The trial court (the Circuit Court of Cook County, Illinois) dismissed the counts in both complaints seeking damages for future expenses of raising the respective children, holding that the public policy of the State of Illinois precluded the recovery of such damages *per se,* notwithstanding the

extent of the defendants' malpractice and notwithstanding plaintiffs' argument that such dismissals posed an unconstitutional burden on plaintiffs' fundamental right to privacy, to limit procreation through contraception, and to a limited extent, abortion. Separate appeals were filed by both sets of plaintiffs.

After consolidation of both cases on appeal, the Appellate Court of Illinois issued its opinion reversing the Circuit Court of Cook County, Illinois. The Appellate Court of Illinois rejected the rationale denying damages based on the "right to life" statement of legislative intent and public policy expressed by the Illinois legislature in the Illinois Abortion Act of 1975, *Ill. Rev. Stat.* Chap. 38, ¶81-21 (1977).

The Appellate Court of Illinois, in its decision in the instant case, recognized the fundamental right of parents to control their reproductivity, and held that public policy pronouncements of the state legislature, which were at variance with the decisions of this Court, could not properly be used to deny recovery for the full measure of damages proximately caused by a physician's or a hospital's negligence.

The Supreme Court of Illinois reversed the decision of the Appellate Court of Illinois based upon the perceived public policy of the State of Illinois to "protect human life" and "develop and preserve family relations".

In dissent, Mr. Justice Clark, of the Illinois Supreme Court, criticized the majority's rationale, reasoning that decisions of this Court affirm Petitioners' protected right to choose not to procreate, and that this Court did not perceive any threat to the sanctity of life in rendering

those decisions, and that allowing recovery for all damages which proximately flow from a tortious interference of this fundamental privacy right, is no more and no less than the Constitution requires.

This petition follows in due course. The constitutional issues involved in this petition were raised at each step of the proceedings below.

REASONS FOR GRANTING THE WRIT

1.

THE ILLINOIS SUPREME COURT'S PRONOUNCEMENT, THAT TORTFEASORS CANNOT BE LIABLE PER SE FOR CERTAIN DAMAGES ARISING OUT OF MEDICAL MALPRACTICE WHEN A DIRECT RESULT OF SUCH NEGLIGENCE IS THE BIRTH OF AN UNPLANNED CHILD, POSES AN UNCONSTITUTIONAL BURDEN ON A WOMAN'S FUNDAMENTAL RIGHT TO PRIVACY AND FREEDOM OF PERSONAL CHOICE IN FAMILY PLANNING.

The Appellate Court of Illinois, in its decision which was reversed by the Illinois Supreme Court, recognized the fundamental right of parents to control their reproductivity and held that public policy pronouncements of the state legislature which were at variance with the decisions of this Court could not properly be used to deny recovery for the full measure of damages proximately caused by a physician's or a hospital's negligence. As stated by the Appellate Court of Illinois at 425 N.E. 2d, 970:

> "The defendants do not dispute the legal sufficiency of the allegation that their negligence was the direct and proximate cause of the expenses which the plaintiffs seek to recover. Instead, they argue that for reasons of public policy, damages should be limited to pregnancy and birth related costs. The defendants rely on *Wilczynski* v. *Goodman* (1979) 73 Ill.App.3d 51, 29 Ill.Dec. 216, 391 N.E.2d 479, for the proposition that public policy deems the birth of a healthy child a precious gift rather than a compensable wrong.

> While we agree that most parents hold the sentiment that the birth of a healthy albeit unplanned child is always a benefit, we are not inclined to raise this sentiment to the level of public policy. The uniqueness of life is in no way denigrated by a couple's choice not to have a child. Neither the individual nor society as a whole is harmed by the exercise of this choice. Recognizing this, the right to limit procreation through contraception and, to a limited extent abortion, has been held to come within a constitutionally protected 'zone of privacy.' (*Griswold* v. *Connecticut* (1965), 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510; *Roe* v. *Wade* (1973), 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147.) Regardless of motivation, a couple has the right to determine whether they will have a child. That right is legally protectible and need not be justified or explained. The allowance of rearing costs is not an aspersion upon the value of the child's life. It is instead a recognition of the importance of the parent's fundamental right to control their reproductivity. (See Comment, Wrongful Life: Birth Control Spawns a Tort, 13 John Marshall L.Rev. 401, 420 (1980).) We cannot endorse a view that effectively nullifies this right by providing that its violation results in no injury. For these reasons, we are not persuaded that public policy considerations can properly be used to deny recovery to parents of an unplanned child of the full measure of all damages proximately caused by a physician's negligence."

The Supreme Court of Illinois reversed the decision of the Appellate Court of Illinois based upon the perceived public policy of the State of Illinois to "protect human life" and "develop and preserve family relations". *Cockrum, supra,* 447 N.E.2d 385. Although the Supreme Court of Illinois expressly recognized the existence of the causes of action arising out of the acts of malprac-

tice committed against the respective Plaintiffs in this consolidated case, it limited the damages recoverable by Petitioners *per se*, thus unconstitutionally burdening the Plaintiffs' fundamental privacy right to control procreation and reproductivity under the guise of achieving a supposedly desirable social result. In doing so, the Illinois Supreme Court held that this Court's decisions in *Roe* v. *Wade, supra,* and *Griswold* v. *Connecticut, supra,* were irrelevant to the issue of whether damages could be recovered for the cost of raising and educating the unplanned children of Plaintiffs, and rejected the logic that the rule of damages in the instant malpractice cases should be the same as that applied to non-birth related malpractice actions, namely, that tortfeasors should be held liable for all damages that they have proximately caused as a result of a breach of duty owed by them to plaintiffs in such actions.

The Illinois Supreme Court held that this general rule of tort damages was "not suited to the circumstances in this character of case." 447 N.E.2d at page 390. As stated by Mr. Justice Ward, speaking for the majority of the Illinois Supreme Court:

> "We do not perceive the relevance here of *Griswold* v. *Connecticut* (1965), 381 U.S. 479, 14 L.Ed.2d 510, 85 S.Ct. 1678, and *Roe* v. *Wade* (1973), 410 U.S. 113, 35 L.Ed.2d 147, 93 S.Ct. 705, cited by the plaintiffs. In *Griswold* the court invalidated a statute making the use of contraceptives an offense. The court deemed that by outlawing the use of contraceptives the State unnecessarily invaded marital privacy. In *Roe,* the court held that a woman's right to privacy is violated by a statute that prohibits all abortions that are not necessary to preserve the mother's life.

The decisions appear irrelevant to the issue of whether damages may be recovered under the circumstances here for expenses after the birth of the child. The plaintiffs refer to these decisions in opposing considerations of public policy argued by the defendants and relied upon by some of the decisions we have cited. We would note that the plaintiffs themselves, as we shall show, rely upon public policy.

We cannot on balance accept the plaintiffs' contention too that we should rigidly and unemotionally, as they put it, apply the tort concept that a tortfeasor should be liable for all of the costs he has brought upon the plaintiffs." 447 N.E.2d at page 390.

Mr. Justice Clark, however, in his dissenting opinion, disputed the reasoning of the majority because it was at variance with the opinions of this Court:

"*Griswold* v. *Connecticut* (1965), 381 U.S. 479, L.Ed.2d 510, 85 S.Ct. 1678, and *Roe* v. *Wade* (1973), 410 U.S. 113, 35 L.Ed.2d 147, 93 S.Ct. 705, established that the right to limit procreation was a constitutionally protected right. *The United States Supreme Court did not perceive any threat to the sanctity of life by recognizing that a married couple has the right to choose not to procreate. To deny child-rearing expenses effectively nullifies that right by severely impairing the remedy available to parents who, after choosing not to conceive a child, have found that due to a negligently performed vasectomy they are going to be parents. A couple's decision not to have a child does not undermine the value of a human life.* In allowing recovery for damages for child-rearing expenses, we would only be compensating parents for damages that naturally flow from the commission of the tortious act which this court has now recognized." 447 N.E.2d at page 392. (Emphasis ours)

The Court has made it clear in its decisions on reproductive rights that the "liberty" protected by the Due Process Clause of the Fourteenth Amendment includes not only the freedoms explicitly mentioned in the Bill of Rights, but also a freedom of personal choice in certain matters of reprodution and family life. *Griswold* v. *Connecticut*, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965); *Eisenstadt* v. *Baird*, 405 U.S. 438 (1972); and *Roe* v. *Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973), recently reaffirmed in *Akron* v. *Akron Center For Reproductive Health*, 43 CCH S.Ct. Bull. p. 3336; *Planned Parenthood Assn.* v. *Ashcroft*, 43 CCH S.Ct. Bull. p. 3394; and *Simopoulos* v. *Virginia*, 43 CCH S.Ct. Bull. p. 3427 (June 15, 1983).

In *Griswold* and *Eisenstadt*, the Court held that a state statute proscribing the use or distribution of contraceptives was an unconstitutional intrusion upon a citizen's right of privacy and violated the Fifth and Fourth Amendments to the Constitution as well as the Equal Protection Clause of the Fourteenth Amendment thereto. In *Roe* v. *Wade, supra,* when confronted with a state statute making it a crime to procure or attempt an abortion except on medical advice for the purpose of saving the mother's life, the Court held that the implicit constitutional liberty contained in the penumbra includes the freedom of a woman to decide whether to terminate her pregnancy, although a state does have a legitimate interest during the pregnancy in both ensuring the health of the mother and protecting the potential human life. As stated by the Court in its recent pronouncement reaffirming *Roe*:

> "In *Roe* v. *Wade*, the Court held that the 'right of privacy, . . . founded in the Fourteenth Amendment's

concept of personal liberty and restrictions upon state action, . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.' 410 U.S., at 153. Although the Constitution does not specifically identify this right, the history of this Court's constitutional adjudication leaves no doubt that 'the full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution.' *Poe* v. *Ullman,* 367 U.S. 497, 543 (1961) (Harlan, J., dissenting from dismissal of appeal). Central among these protected liberties is an individual's 'freedom of personal choice in matters of marriage and family life.' *Roe,* 410 U.S., at 169 (Stewart, J., concurring). *See, e.g., Eisenstadt* v. *Baird,* 405 U.S. 438 (1972); *Loving* v. *Virginia,* 388 U.S. 1 (1967); *Griswold* v. *Conneticut,* 381 U.S. 479 (1965); *Pierce* v. *Society of Sisters,* 268 U.S. 510 (1925); *Meyer* v. *Nebraska,* 262 U.S. 390 (1923). The decision in *Roe* was based firmly on this long-recognized and essential element of personal liberty." *Akron* v. *Akron Center For Reproductive Health, supra,* at pp. 3343-3344.

It is well settled that if a law impinges upon a fundamental right explicitly or implicitly secured by the constitution, it is presumptively unconstitutional. *Shapiro* v. *Thompson,* 394 U.S. 618, 634, 638 (1971); *Id.,* at 642-644 (conurring opinion). Petitioners submit that the instant decision of the Illinois Supreme Court, which interferes with constitutionally protected activity by arbitrarily limiting recoverable damages *per se* in a medical malpractice action only because the result of the tort was the birth of an unwanted child, impermissibly violates substantive privacy rights secured by the constitution without serving any offsetting compelling

state interest, and is, therefore, unconstitutional and should be reversed.

Despite this Court's mandate in *Roe* v. *Wade supra,* that in the first trimester of pregnancy the abortion decision and its effectuation must be left to the medical judgment of the physician in consultation with his patient, the Illinois Supreme Court's decision unconstitutionally attempts to advance Illinois' continuing anti-abortion policy by placing an undue burden on a woman seeking to exercise her fundamental right to choose abortion without a showing of any compelling state interest.

The obvious intent of the instant Illinois Supreme Court decision is to restrict women from exercising their rights by arbitrarily limiting damages *per se* in malpractice actions against negligent physicians and hospitals, merely because the tort committed results in either an unwanted conception or birth.

In *Roe* v. *Wade, supra,* this Court established the principle that the "right of privacy is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." *Id.* at Page 153. While recognizing that some state regulation of areas protected by the right to privacy are appropriate (e.g.: safeguarding health, meeting medical standards, and protecting potential life), the Court has set strict limits on the power of the state to regulate abortions in promoting these legitimate state interests. *Id.* at 154. *Roe* v. *Wade, supra, Doe* v. *Boulton,* 410 U.S. 179 (1973); *Planned Parenthood of Central Missouri* v. *Danforth,* 428 U.S. 52 (1976); *Carey* v. *Population Services International,* 431 U.S. 678 (1977); and *Colautti* v. *Franklin,* 439 U.S. 379 (1979).

The decision in *Roe* v. *Wade, supra,* sets forth a three-tiered standard for analyzing abortion restrictions. For the stage prior to the end of the first trimester the abortion decision and its effectuation must be left to the medical judgment of the patient's attending physician. 410 U.S. at 163-164, 166. For the stage following the first trimester, the state may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health. *Id.* at 163-165. For the stage subsequent to viability, the state, in promoting its interest in the potentiality of human life, may, if it chooses, regulate and even proscribe abortion, except where it is necessary, in appropriate medical judgment, for the preservation of the life and health of the mother. *Id.* at 163-165.

Because the constitutional right of privacy guarantees independence in certain fundamental decisions, governmental regulation of such decisions can only be justified by the showing of a "compelling state interest". *Roe* v. *Wade, supra,* at page 155. *Roe* v. *Wade, supra,* and its companion case, *Doe* v. *Boulton, supra,* also recognized that some laws interfere with the effectuation of the abortion decision. The same "compelling state interest" test applies to restrictions on effectuation of abortion because they "substantially [limit] access to the means of effectuating" the abortion decision.

In *Carey* v. *Population Services International, supra,* the Court struck down a New York criminal statute which limited the sale and advertising of contraceptives. The Court held that since the statute limited access to the means of effectuating the contraception decision, it could be justified only by a " 'compelling state interest' . . . and must be narrowly drawn to express only the legiti-

mate state interest at stake." Citing, *Roe* v. *Wade, supra,* 431 U.S. at p. 688. The Court found that the State of New York could not meet its burden in proving that the imposed restrictions promoted a compelling and legitimate state interest.

Accordingly, regulations restricting abortion must be viewed with strict judicial scrutiny. The restrictions "cannot be unduly burdensome . . . and will be stricken if the state has alternative, less intrusive means by which it can effectuate its interest." *Carey* v. *Population Services International, supra,* at p. 686; *Roe* v. *Wade supra.*

Petitioners respectfully submit that there can be no compelling state interest to the right to life where the tortious act, such as negligent sterilization, occurs prior to conception. Petitioners furthermore submit that there is also no compelling state interest in the right to life where the act of negligence, whether a misdiagnosis of pregnancy or an improperly performed abortion, occurs prior to the termination of the first trimester.

The instant decision of the Illinois Supreme Court is unconstitutional since it totally ignores this Court's enunciation on reproductive rights, and, in effect, unconstitutionally imposes a direct burden on the exercise of a fundamental right of an individual to avoid or abort a pregnancy.

As stated by Mr. Justice Clark in his dissent to the Illinois Supreme Court opinion:

> "The United States Supreme Court did not perceive any threat to the sanctity of life by recognizing that a married couple has a right to choose not to procreate. To deny child-bearing expenses effectively

nullifies that right by severely impairing the remedy available to parents who, after choosing not to conceive a child, have found that due to a negligently performed vasectomy they are going to be parents. A couple's decision not to have a child does not undermine the value of a human life. In allowing recovery for damages for child-rearing expenses, we would only be compensating parents for damages that naturally flow from the commission of the tortious act which this Court has now recognized." 447 N.E. 2d at 392.

2.

THE PUBLIC POLICY PRONOUNCEMENT OF THE ILLINOIS LEGISLATURE, CITED WITH APPROVAL BY THE STATE COURTS OF ILLINOIS, IS IN DIRECT CONFLICT WITH THE UNITED STATES CONSTITUTION AS INTERPRETED BY THIS COURT, AND AS SUCH CANNOT BE USED TO SUSTAIN THE POSITION TAKEN BY THE ILLINOIS SUPREME COURT.

This Court, in *Roe* v. *Wade, supra,* and *Griswold* v. *Connecticut, supra,* affirmed the constitutional guarantees afforded Petitioners by the Ninth and Fourteenth Amendments to the United State Constitution, which clearly support the contention that public policy does not require that Petitioners be barred from prosecuting their claim for damages in this case. The majority opinion of the Illinois Supreme Court cited with approval the case of *Wilczynski* v. *Goodman,* 73 Ill.App.3d 51, 29 Ill.Dec. 216, 391 N.E.2d 479 (1979), for the proposition that Petitioners could not recover the expenses of rearing a child born as a result of medical malpractice *per se* because of the public policy of the State of Illinois as articulated by the Illinois State Legislature in the Illinois Abortion Act of 1975.

Section 1 of the Illinois Abortion Act of 1975, *Ill. Rev. Stat.* (1977), Chap. 38, §81-21, in effect at the time of the issuance of the *Wilczynski, supra,* opinion provided as follows:

"Legislative Intention

It is the intention of the General Assembly of the State of Illinois to reasonably regulate abortion in conformance with the decisions of the United States Supreme Court of January 22, 1973. Without in any way restricting the right of privacy of a woman or the right of a woman to an abortion under those decisions, the General Assembly of the State of Illinois do solemnly declare and find in reaffirmation of the longstanding policy of this State, that the unborn child is a human being from the time of conception and is, therefore, a legal person for purposes of the unborn child's right to life and is entitled to the right to life from conception under the laws and Constitution of this State. Further, the General Assembly finds and declares that longstanding policy of this State to protect the right to life of the unborn child from conception by prohibiting abortion unless necessary to preserve the life of the mother is impermissible only because of the decisions of the United States Supreme Court and that, therefore, if those decisions of the United States Supreme Court are ever reversed or modified or the United States Constitution is amended to allow protection of the unborn then the former policy of this State to prohibit abortions unless necessary for the preservation of the mother's life shall be reinstated."[1]

---

[1] Shortly after the Illinois Appellate Court rendered its decision in *Wilczynski, supra,* the Illinois General Assembly amended §1 of the Illinois Abortion Act to add the following additional language:

"It is the further intention of the General Assembly to assure and protect the woman's health and the

After citing the aforesaid provisions of the Illinois Abortion Law of 1975, the *Wilczynski* court stated:

> "In our judgment, a public policy which deems precious even potential life while yet in the womb, at such cost and expense that condition may entail, does not countenance as compensable damage to its parent or parents those additional costs and expenses necessary to sustain and nurture that life once it comes to fruition upon and after successful birth." 29 Ill. Dec. at page 224.

The Illinois Supreme Court in *Cockrum* specifically cited the reasoning of *Wilczynski* with approval in denying Petitioners right to recover the damages sought herein. 447 N.E.2d at 389.

The Illinois Legislature's pronouncement on public policy, as perceived in *Wilczynski*, was rejected by courts in numerous jurisdictions prior to the Illinois Supreme Court decision in *Cockrum*. In the Illinois Appellate

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[1] (Continued)

> integrity of the woman's decision whether or not to continue to bear a child, to protect the valid and compelling State interest in the infant and unborn child, to assure the integrity of marital and familial relations and the rights and interests of persons who participate in such relations, and to gather data for establishing criteria for medical decisions. The General Assembly finds as fact, upon hearings and public disclosures, that these rights and interests are not secure in the economic and social context in which abortion is presently performed."

Notwithstanding this additional language, however, the language contained in the act prior to amendment declaring that an unborn child is a human being at the time of conception and is therefore entitled to a right to life and further taking issue with the decisions of this Court, was not deleted from the Act.

Court decision in *Cockrum, supra,* Justice Linn in his concurring opinion stated:

> ". . . to raise, as was done in *Wilczynski,* questions of ethics, morality, and so-called 'pro-life' has no place in a case concerning whether a physician should be liable for negligence and suggests that emotion rather than reasoning can be used to determine the issue . . . The only real issue is one of compensable damages and this question must be determined without indulging in philosophical or religious non-issues . . ." 425 N.E.2d at 971.

The Pennsylvania Supreme Court in the case of *Speck* v. *Finegold,* 439 A.2d 110 (Pa. S. Ct. 1981), *affirming,* 268 Pa. Super. 342, 408 A.2d 496 (1979), held that the plaintiff could maintain an action in tort for expenses attributable to the birth and raising of an infant born as a result of a negligently performed vesectomy and negligently performed abortion and rejected the public policy argument relied upon in the *Wilczynski* opinion and stated as follows:

> "There is a view, of course, that no duty of care shall extend from the doctor to the patient in a case involving damages alleged as a result of the birth of an unplanned child. One argument against the parents' right to bring an action is that because the public policy of the Commonwealth favors birth over abortion . . . the approval of such a cause of action is in contravention of a legislatively declared policy. This argument cannot prevail for several reasons. Firstly, recognition of a cause of action in the circumstances of this case simply has no impact on whether abortions are performed in the Commonwealth; it neither advances nor impedes abortion activity, and therefore cannot be said to be in conflict with a public policy which favors child birth over

abortion. Rather, the recognition of such causes of action would merely accord injuries received as a result of negligently performed sterilization or abortion procedures the same legal protection accorded any other negligently performed medical procedure.

Secondly, reliance on the Commonwealth public policy favoring birth over abortion to defeat plaintiff's cause of action cannot succeed because it squarely conflicts with the plaintiff's constitutional rights as articulated in *Roe* v. *Wade,* 410 U.S.113, 93 S. Ct. 705, 35 L.Ed. 2d 147 (1973), to seek a termination of pregnancy under certain circumstances. Were the plaintiff merely free to seek the abortion but unable to seek a remedy at law for injuries consequent upon the negligent performance of that abortion, the right would be hollow indeed. [Footnote omitted.]

Thirdly, were no duty of care imposed upon physicians in the context of this case, and were no cause of action permitted, there would be a frustration of the fundamental policies of tort law in the Commonwealth: to compensate the victim, deter negligence, and encourage due care. Thus, in *Ayala* v. *Philadelphia Board of Public Education,* 453 Pa. 584, 599, 305 A.2d 877, 884 (1973), this Court, quoting Dean Prosser, stated:

> "The "prophylactic' factor of preventing future harm has been quite important in the field of torts. The courts are concerned not only with compensation of the victim, but with admonition of the wrongdoer. When the decision of the courts become known, and defendants realize that they may be held liable, there is of course a strong incentive to prevent the occurrence of the harm. Not infrequently one reason for imposing liability is the deliberate purpose of providing that incentive."

See also, Flagiello v. *Penna. Hospital,* 417 Pa. 486, 505, 208 A.2d 193, 202 (1965).

> If it is the case, as alleged in plaintiffs' suit, that they have been substantially injured by the defendants' negligence, to deny plaintiffs even the opportunity to present their case in a court would be to grant an unjustifiable and unfair windfall to the defendants, who would escape liability for the harm resulting from their alleged negligence . . ." 439 A.2d 110 at 114-15.

The Supremacy Clause of the United States Constitution provides:

> "This Constitution, and the laws of the United States, which shall be made in pursuance thereof . . . shall be the supreme law of the land, and the judges in every State shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding . . ." U.S. CONST., Art. VI, §2.

Accordingly, neither the General Assembly of the State of Illinois, nor the courts of the State of Illinois, has the right to declare any public policy that clearly contravenes or nullifies the rights declared in the federal Constitution. 16 Am. Jur. 2d Constitutional Law, §70 at page 392; *Kintz* v. *Harriger*, 124 N.E. 168, 170 (Ohio, 1919).

Petitioners submit that the so-called "right to life" position asserted by the Illinois Legislature, which was endorsed with approval by the courts of the State of Illinois in the Illinois Appellate Court decision in *Wilczynski, supra*, and in the Illinois Supreme Court decision in *Cockrum, supra*, clearly violates the standards set down by this Court in *Roe* v. *Wade, supra* and *Griswold* v. *Connecticut, supra*, in that said supposed public policy seeks to interfere with Petitioners' freedom of choice in family planning and their right to effectuate conception and abor-

tion, both at the respective stages prior to conception as well as prior to the termination of the first trimester.

Because the Illinois Supreme Court decision in *Cockrum, supra,* is based solely on inhibiting implementation of Petitioner's sterilization or pre-viability abortion decision, it must fail in its entirety.

There is clearly no compelling state interest in the so-called "right to life" where the negligent act of a physician or hospital occurs either prior to conception or prior to viability. Accordingly, the decision of the Illinois Supreme Court must be reversed.[2]

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[2] The majority opinion of the Illinois Supreme Court in *Cockrum, supra,* also buttressed its opinion on the supposed public policy considerations of preserving family relations, citing cases such as *Rieck* v. *Medical Protective Company,* 64 Wis. 2d 514, 219 N.E.2d 242 (1974), and *Public Health Trust* v. *Brown,* (Fla. App. 1980) 388 So. 2d 1084, for the proposition that a child may suffer emotionally if he discovers that he was unwanted, which would be the supposed result where causes of action such as the instant one, are allowed to proceed to recovery of full damages.

This stigmatization argument has been rejected on the basis that the speculative emotional injury that the child might suffer clearly does not justify precluding recovery per se. As stated by the Illinois Appellate Court in *Cockrum, supra*:

> "Regardless of motivation, a couple has the right to determine whether they will have the child. That right is legally protectible and need not be justified or explained. The allowance of rearing costs is not an aspersion upon the value of the child's life. It is instead a recognition of the importance of the parents' fundamental right to control their reproductivity. (See, Comment, Wrongful Birth: Birth Control Spawns a Tort, 13 John Marshall L. Rev. 401, 420 (1980)). We cannot endorse a view that effec-

CONCLUSION

The decision of the Illinois Supreme Court totally ignores this Court's decisions on reproductive rights and unconstitutionally imposes a direct burden on the exercise of Petitioners' fundamental rights with respect to privacy and family planning. Based upon a provincial legislative pronouncement of public policy, explicitly at variance with the decisions of this Court, the Illinois Supreme Court has elected to carve out defenses, *per se*, to certain acts of medical malpractice, where the result of such negligence is the birth of a child. The effect of this decision is to severely limit Petitioners' rights to effectuate the family planning decisions which this Court

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[2] (Continued)

> tively nullifies this right by providing that its violation results in no injury. For these reasons, we are persuaded that public policy considerations cannot properly be used to deny recovery to parents of an unplanned child of the full measure of all damages proximately caused by a physician's negligence." 425 N.E. 2d at 968.

See also the decision of the California Court of Appeals in *Custodio* v. *Bauer*, 251 Cal. App.2d 353, 59 Cal. Rptr. 463 (1967) which held, where a couple's tenth child was born after the failure of a tubal ligation:

> "One cannot categorically say whether the tenth arrival in the [plaintiff's] family will be more emotionally upset if he arrives in an environment where each of the other members of the family must contribute to his support, or whether he will have a happier or more well-adjusted life if he brings with him the wherewithal to make it possible." 59 Cal. Rptr. at 477.

has held to be their constitutional right to exercise, while creating a special privileged area of medical malpractice in the process.

For the above and foregoing reasons, it is respectfully requested that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Illinois.

Respectfully submitted,

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APPENDIX A

IN THE
CIRCUIT COURT OF COOK COUNTY, ILLINOIS

EDNA RAJA and AFZAL RAJA,

Plaintiffs,

v.

DR. A. TULSKY and MICHAEL REESE HOSPITAL AND MEDICAL CENTER,

Defendants.

ORDER

This matter coming on to be heard on defendant, Michael Reese Hospital's motion to dismiss Count IV of plaintiffs' complaint, due notice having been given, and the court being fully advised in the premises;

IT IS HEREBY ORDERED that defendant's motion is granted and Count IV of plaintiffs' complaint is dismissed pursuant to the holding announced in *Wilczynski* v. *Goodman*, 371 NE 2d 479 (1979). There is no just reason for delay in the enforcement or appeal of this order. This order is final and appealable.

/s/ Louis Giliberto, Judge,

March 27, 1980

APPENDIX B

Fourth Division
Filed July 2, 1981

80-1245)
) Cons.
80-1300)

DONNA COCKRUM and LEON COCKRUM,

Plaintiffs-Appellants,

vs.

DR. GEORGE BAUMGARTNER and UNKNOWN LABORATORY,

Defendants-Appellees.

and

EDNA RAJA (formerly known as EDNA ACKER) and AFZAL RAJA,

Plaintiffs-Appellants,

vs.

DR. A. TULSKY,

Defendant,

and

MICHAEL REESE HOSPITAL AND MEDICAL CENTER, a Corporation,

Defendant-Appellee.

Appeal from the Circuit Court of Cook County
Honorable Louis J. Giliberto, Presiding.

Mr JUSTICE JIGANTI delivered the opinion of the court:

The question raised by these two cases, consolidated on appeal, is whether the parents of a healthy child born as a result of a negligently performed sterilization operation may recover as an element of damages the expenses of raising and educating the child.

In *Cockrum* v. *Baumgartner,* the defendant physician attempted to perform a vasectomy upon the plaintiff, Leon Cockrum. The plaintiff returned for a sperm test one month later and was informed by the defendant that the operation was successful. Approximately six weeks after the date of the test, Donna Cockrum learned that she was pregnant. The defendant then performed another sperm test upon Leon Cockrum and detected the presence of live sperm cells. Donna and Leon Cockrum subsequently became the parents of a healthy boy. They brought this action against the defendant seeking to recover, among other things, the expenses of raising and educating the child.

In *Raja* v. *Tulsky,* Dr. Tulsky performed a bilateral tubal cauterization upon the plaintiff, Edna Raja, which was intended to render her sterile. Approximately five years later, Edna Raja began to experience indications of pregnancy and went to the Michael Reese Gynecology Clinic for an examination. She was informed that she was not pregnant. Two months later, after experiencing additional symptoms of pregnancy, Edna Raja returned to the clinic for another examination. She was advised that she was in the advanced stages of pregnancy and that it was no longer medically safe for her to terminate the pregnancy. She subsequently gave birth to a healthy girl. Edna Raja and her husband, Afzal Raja, brought an action against Dr. Tulsky and Michael Reese Hospital. The counts against Dr. Tulsky were dismissed as barred by the statute of limitations and are not pertinent to this appeal. The action against Michael Reese Hospital was

based upon the negligent diagnosis of Edna Raja's condition, resulting in her inability to safely terminate her pregnancy. One element of damages sought by the plaintiffs was compensation for the expenses of raising and educating the child.

In both causes, th terial court dismissed the counts seeking compensation for the expenses of raising and educating the child. The dismissals were based on *Wilczynski* v. *Goodman* (1979), 73 Ill. App. 3d 51, 391 N.E. 2d 479 where the court denied recovery for those elements of damages.

Ethical and moral considerations aside, the cause before us is analytically indistinguishable from an ordinary medical malpractice action. The essential elements of tort liability are alleged. The plaintiffs have alleged that because of the defendants' breach of duty to properly treat and advise them, they will be required to incur the expenses of rearing the unplanned child. According to traditional tort principles, once these allegations of duty, breach of duty and proximate cause are proven, the tortfeasor is liable for all damages which ordinarily and in the natural course of things flow from the commission of the tort. (*Sorenson* v. *Fio Rito* (1980), 90 Ill. App. 3d 368, 413 N.E. 2d 47.) The standard measure of damages in tort thus seeks to place injured plaintiffs in the position that they would have been in had no wrong occurred. *Myers* v. *Arnold* (1980), 83 Ill. App. 3d 1, 403 N.E.2d 316.

The defendants do not dispute the legal sufficiency of the allegation that their negligence was the direct and proximate cause of the expenses which the plaintiffs seek to recover. Instead, they argue that for reasons of public policy, damages should be limited to pregnancy and birth related costs. The defendants rely on *Wilczynski* v. *Goodman* (1979), 73 Ill. App. 3d 51, 391 N.E.2d 479, for the proposition that public policy deems the birth of a healthy child a precious gift rather than a compensable wrong.

While we agree that most parents hold the sentiment that the birth of a healthy albeit unplanned child is always a benefit, we are not inclined to raise this sentiment to the level of public policy. The uniqueness of life is in no way denigrated by a couple's choice not to have a child. Neither the individual nor society as a whole is harmed by the exercise of this choice. Recognizing this, the right to limit procreation through contraception and, to a limited extent abortion, has been held to come within a constitutionally protected "zone of privacy." (*Griswold* v. *Connecticut* (1965), 381 U.S. 479, 14 L. Ed. 2d 510, 85 S. Ct. 1678; *Roe* v. *Wade* (1973), 410 U. S. 113, 35 L. Ed. 2d 147, 93 S. Ct. 705.) Regardless of motivation, a couple has the right to determine whether they will have a child. That right is legally protectible and need not be justified or explained. The allowance of rearing costs is not an aspersion upon the value of the child's life. It is instead a recognition of the importance of the parent's fundamental right to control their reproductivity. (*See* Comment, *Wrongful Life*: *Birth Control Spawns a Tort,* 13 John Marshall L. Rev. 401, 420 (1980).) We cannot endorse a view that effectively nullifies this right by providing that its violation results in no injury. For these reasons, we are not persuaded that public policy considerations can porperly be used to deny recovery to parents of an unplanned child of the full measure of all damages proximately caused by a physician's negligence.

Several courts which have allowed rearing costs as a proper element of damages have permitted the defendant to show that the plaintiff's financial injury has been offset to a certain degree by the benefits of parenthood. (*See Troppi* v. *Scarf* (1971), 31 Mich. App. 240, 187 N.W.2d 511; *Sherlock* v. *Stillwater Clinic* (Minn. 1977), 260 N.W. 2d 169.) In doing so, these courts have relied primarily upon the so-called "benefits rule" found in section 920 of the Restatement of Torts, which provides:

> "When the defendant's tortious conduct has caused harm to the plaintiff or to his property and in so

> doing has conferred *a special benefit to the interest of the plaintiff that was harmed,* the value of the benefit conferred is considered in mitigation of damages, to the extent that this is equitable." (Restatement (Second) Torts, § 920 at 509 (1979).) (Emphasis added.)

To the extent that this section has been used to permit the emotional rewards of parenthood to offset its financial costs, we believe it has been misapplied. Section 920 clearly provides that a benefit to the plaintiff caused by the defendant's tortious act may be considered in mitigation of the plaintiff's injury only where the benefit is to the same interest which was harmed. The rewards of parenthood should not be allowed in mitigation of rearing costs because "these rewards are emotional in nature and, great though they may be, do nothing whatever to benefit the plaintiff's injured financial interest." Kashi, *The Case of the Unwanted Blessing: Wrongful Life,* 31 U. of Miami L. Rev. 1409, 1415 (1977).

It has been suggested that parents who seek to recover the costs of raising and educating an unplanned child should be required to mitigate damages through abortion or adoption. It is accepted, however, that the doctrine of mitigation requires only that reasonable measures be taken:

> "If the effort, risk, sacrifice, or expense which the person wronged must incur in order to avoid or minimize a loss or injury is such that under all the circumstances a reasonable man might well decline to incur it, a failure to do so imposes no disability against recovering full damages." (McCormick, *Damages* §35 at 133 (1935).

The decision not to conceive a child is totally distinguishable from the decision to abort or place for adoption a child who is already conceived. We do not believe it is reasonable for a defendant to require the parents of an unplanned child to consider abortion or adoption. These

alternatives are uniquely personal choices which cannot be forced upon parents as a means of mitigating damages.

In expressing our conclusion that the cost of raising and educating an unplanned child is a proper element of damages, we are aware that another division of this court reached a different result in *Wilczynski* v. *Goodman* (1979), 73 Ill. App. 3d 51, 391 N.E.2d 479. In *Wilczynski*, the court recognized that the parents of a child born as a proximate result of a negligently performed abortion could bring a negligence action against the physician. However, recoverable damages were limited to pregnancy and birth related costs. The court denied recovery of rearing costs based on its view that the public policy of this State as expressed in section 1 of the Illinois Abortion Act (Ill. Rev. Stat. 1977, ch. 38, par. 81-21) regards the birth of a healthy child as an "esteemed right" rather than a compensable wrong. (*Wilczynski* at 62, 391 N.E.2d ate 487.) As previously stated, we do not believe that this interpretation of public policy can properly be used to deny recovery of the full measure of damages caused by the defendant's negligence. To the extent that Wilczynski disallows these costs, we disagree with that opinion.

For the foregoing reasons, the judgments of the circuit court are reversed.

Reversed.

Mr. Justice Linn, specially concurring:

I agree that parents should be able to seek compensation for the costs of raising and educating a healthy child in cases such as the present ones. In doing so, I recognize that the decision reached today contradicts a previous decision from another division of this court. Though normally I would feel compelled to follow recent decisions from other divisions of this court, I cannot in good conscience accept either the reasoning or the result of the opinion in *Wilczynski* v. *Goodman* (1979), 73 Ill. App. 3d 51, 391 N.E.2d 479, as far as it determined that parents

could not seek compensation for the costs of rearing a healthy child when a physician's negligence in performing a legal abortion caused the child to be born.

The reasoning relied upon by the court in *Wilczynski* was that such compensation would violate a supposed public policy which considers all abortion wrong, regardless of the actual law, and thus considers life to be an "esteemed right" rather than a compensable wrong. (78 Ill. App. 3d 51, 62, 391 N.E.2d 479, 487.) Though such reasoning may be applicable to whether the unwanted healthy child could state a cause of action against the physician on his own behalf, it has no application to whether the parents should recover damages for the injury to their rights. Even assuming life is an "esteemed right" and one's life is precious to oneself, it does not follow that one's existence automatically confers a benefit and no burden on those having a duty to assure one's life is preserved throughout childhood.

Additionally, to raise, as was done in *Wilczynski*, questions of ethics, morality, and so-called "pro-life" has no place in a case concerning whether a physician should be liable for his negligence and suggests that emotion rather than reasoning can be used to determine the issue. The only real issue is one of compensable damages and this question must be determined without indulging in philosophical or religious non-issues.

Though I agree that the parents should be allowed to seek compensation for the costs of rearing a healthy child, I cannot agree with the conclusion that the benefits the parents may derive from the parent-child relationship should be ignored in determining the amount of damages. My fellow Justice believes that such benefits cannot be considered because no special benefit has been conferred on the interest that has been harmed — the right of the parents to choose whether they will have a child. However, I think that this narrow application of the "special benefits" rule will create inequitable results

because it presumes that the injury done to the parents' interests is the same in all cases. One must recognize that the reasons parents have for practicing birth control vary and any injury done to their interests as parents will be different in each case. Can it be said that parents in their twenties who merely wanted to postpone having a child will suffer the same degree of injury from a physician's negligence in causing a child to be born as will parents in their forties who already have grown children and have decided not to undergo the burden of raising any more children? Damages should be awarded based on the degree of injury that has occurred, and by allowing the potential benefits that the parents may derive from the parent-child relationship to be considered as one factor in determining the amount of damages will result in redressing the degree of injury that has been caused.

Thus, I believe the proper rule to be that any potential benefits that the parents may derive from the parent-child relationship, whether they be in the form of companionship, the possibility of future financial support, or otherwise, should be one factor the trier of fact should be allowed to consider in determining the amount of damages. The injury done by a physician's negligence is, in effect, an injury done to the parents' overall "family interests" and the benefits that may be derived are benefits to those "family interests." Accord, *Troppi* v. *Scarf* (1971), 31 Mich. App. 240, 187 N.W.2d 511.

However, this does not mean that I agreed with the defendants' argument that in all cases the parents will be expected to derive such an overwhelming emotional benefit from having a healthy child that damages should be nominal, if anything, as a matter of law. Whether there will be any benefits and the value of any possible benefits are not issues of law. Each case depends on its own facts. Poor parents with many children may actually be expected to derive more stress than pleasure from having an additional child. Older parents who have chosen not to have any more children may not be expected

to derive the same degree of benefit from having an additional child as younger parents who have chosen merely to postpone having a child. The trier of fact should be allowed to consider many factors, including family size, family income, the age of the parents, and marital status, to determine the existence or value of any potential benefits. *Troppi* v. *Scarf* (1971), 31 Mich. App. 240, 187 N.W.2d 511.

Finally, I admit that the determination of the existence or value of any possible benefits involves a degree of speculation, but I do not see how allowing the trier of fact to make the determination will result in any more speculation than when the trier of fact is presently called upon to determine the existence or value of pain and suffering in personal injury cases, of severe emotional distress in cases of intentional infliction of emotional distress, or of companionship in loss of consortium cases.

Accordingly, I concur in the decision of this court as far as it allows the parents to seek compensation for the costs of raising a healthy child in cases such as the present ones, but I would allow any possible benefits the parents may derive from the parent-child relationship to be one factor a trier of fact may consider in determining the amount of damages.

MR. PRESIDING JUSTICE ROMITI,
SPECIALLY CONCURRING:

I too join with Justice Jiganti in his determination that the plaintiffs in these cases are entitled to seek recovery for the expenses of raising and educating the unplanned children which they allege were the result of defendant's negligence. However I also join with Justice Linn but only to the extent of finding that the offsetting benefits plaintiffs may derive from having these unplanned children should neither be excluded as a matter of law from the calculation of damages nor should they be held to automatically offset all damages. As was stated in *Troppi* v. *Scarf* (1971), 31 Mich. App. 240, 256-57, 187 N.W.2d 511, 518-19:

> • • • • we believe [the special benefits] rule to be essential to the rational disposition of this case and the others that are sure to follow.
>
> • • •
>
> The essential point, of course, is that the trier must have the power to evaluate the benefit according to all the circumstances of the case presented. Family size, family income, age of the parents, and marital status are some, but not all, the factors which the trier must consider in determining the extent to which the birth of a particular child represents a benefit to his parents. That the benefits so conferred and calculated will vary widely from case to case is inevitable."

Allowing the application of the special benefits rule in these cases will grant the trier of fact a degree of flexibility in calculating damages which should result in more equitable awards, a goal expressed in the very terms of the rule.

APPENDIX C

Docket No. 55733—Agenda 22—September 1982.

DONNA COCKRUM *et al.*, Appellees, v. GEORGE BAUMGARTNER *et al.*, Appellants.—EDNA RAJA *et al.*, Appellees, v. A. TULSKY *et al.* (Michael Reese Hospital and Medical Center, Appellant).

JUSTICE WARD delivered the opinion of the court:

This appeal concerns the extent of the damages that may be recovered in a malpractice action based on a so-called "wrongful pregnancy" or "wrongful birth." The issue was raised in two medical malpractice suits that were consolidated on appeal from the circuit court of Cook County to the appellate court. In both cases, the plaintiffs had alleged that but for the negligence of the defendants each of the female plaintiffs would not have borne a child. In both actions, the plaintiffs sought to recover for the pain of childbirth, the time lost in having the child, and the medical expenses involved. The plaintiffs sought also to recover as damages the future expenses of raising the children, who, it would appear, are healthy and normal. The circuit court dismissed the counts that set out the claims for the expenses of rearing the children. The plaintiffs appealed, and the appellate court reversed those judgments. (99 Ill. App. 3d 271.) We granted the defendants leave to appeal under Rule 315 (73 Ill. 2d R. 315).

Both suits were filed in the circuit court of Cook County. Cockrum v. Baumgartner was brought by Donna and Leon Cockrum against Dr. George Baumgartner and a laboratory that performed tests according to Dr. Baumgartner's instructions. The Cockrums alleged that Dr. Baumgartner negligently performed a vasectomy upon Leon Cockrum. Also, they claimed that he was negligent in telling them that a sperm test conducted by the labora-

tory showed no live sperm when he should have known that the laboratory report showed that the vasectomy had been medically unsuccessful. The Cockrums also alleged that after the attempted vasectomy Donna Cockrum became pregnant and gave birth to a child, and they claimed that she would not have become pregnant if the physician had not been negligent.

In Raja v. Tulsky, Edna and Afzal Raja brought an action against Dr. A. Tulsky and Michael Reese Hospital and Medical Center. The Rajas alleged that Dr. Tulsky negligently performed a bilateral tubal cauterization upon Edna Raja, which operation was designed to make her sterile. They alleged that about five years after the operation Edna Raja began to experience signs of pregnancy. She was examined at Michael Reese's gynecology clinic and advised, however, that she was not pregnant. Later, after the time in which the plaintiffs say it was medically safe to have an abortion, she learned that she was in fact pregnant. Edna Raja alleged that she suffers from hypertensive cardiac disease, and that she had been informed that it would be medically dangerous for her to have a child. The Rajas claim that Michael Reese was negligent in failing to determine that she was pregnant. They say that if Michael Reese had told her that she was pregnant, she would have elected to terminate the pregnancy. Those counts in which Dr. Tulsky was named as a defendant were dismissed as barred by the statute of limitations and are not at issue here.

The Rajas and the Cockrum each gave birth to a child, and there is no indication that the children are other than normal and healthy. The only issue is whether the trial court erred in dismissing the counts in which the plaintiffs sought to recover as damages the future expenses of rearing the child.

As we have stated, the appellate court held that such expenses are recoverable. The members of the panel in the appellate court disagreed, however, in one respect. Two

of the three judges believed that in determining damages the trier of fact should be permitted to consider the benefits the plaintiffs receive from the parent-child relationship. (99 Ill. App. 3d 271, 275-77 (Linn, Jr., specially concurring), 277 (Romiti, P.J., specially concurring).) The third member of the court, on the other hand, considered that such an offset would be improper. 99 Ill. App. 3d 271, 274.

The courts in the majority of States that have considered "wrongful pregnancy" or "wrongful birth" actions have recognized a cause of action against a physician where it is alleged that because of the doctor's negligence the plaintiff conceived or gave birth. (See Annot., *Tort Liability for Wrongfully Causing One to be Born*, 83 A.L.R.3d 15, 29 (1978).) These courts have generally held that in such actions the infant's parents may recover for the expenses of the unsuccessful operation, the pain and suffering involved, any medical complications caused by the pregnancy, the costs of delivery, lost wages, and loss of consortium. (83 A.L.R.3d 15, 29-30.) There is sharp disagreement, however, on the question involved here: whether plaintiffs may recover as damages the costs of rearing a healthy child.

There are courts which have allowed the recovery of the cost of rearing a child on the ground that such expense is a foreseeable consequence of the negligence. Those courts also have held that this recovery may be offset, however, by an amount representing the benefits received by the parents from the parent-child relationship. See *Stills* v. *Gratton* (1976), 55 Cal. App. 3d 698, 127 Cal. Rptr. 652; *Ochs* v. *Borrelli* (1982), 187 Conn. 253, 445 A.2d 883; *Pierce* v. *DeGracia* (1982), 103 Ill. App. 3d 511; *Troppi* v. *Scarf* (1971) ,31 Mich. App. 240, 187 N.W.2d 511; *Sherlock* v. *Stillwater Clinic* (Minn. 1977), 260 N.W. 2d 169; *Mason* v. *Western Pennsylvania Hospital* (1981), 286 Pa. Super. 354, 428 A.2d 1366.

In a substantially greater number of jurisdictions, however, courts have denied recovery in suits for costs of

rearing a child. See *McNeal* v. *United States* (4th Cir. 1982), 689 F.2d 1200 (interpreting Virginia law); *White* v. *United States* (D. Kan. 1981), 510 F. Supp. 146 (interpreting Georgia law); *Boone* v. *Mullendore* (Ala. 1982), 416 So. 2d 718; *Wilbur* v. *Kerr* (1982), 275 Ark. 239, 628 S.W.2d 568; *Coleman* v. *Garrison* (Del. 1975), 349 A.2d 8; *Public Health Trust* v. *Brown* (Fla. App. 1980), 388 So. 2d 1084; *Wilczynski* v. *Goodman* (1979), 73 Ill. App. 3d 51; *Maggard* v. *McKelvey* (*Ky. Ct.* App. 1981), 627 S.W.2d 44; *Kingsbury* v. *Smith* (1982), 122 N.H. ....., 442 A.2d 1003; *P.* v. *Portadin* (1981), 179 N.J. Super. 465, 432 A.2d 556; *Sorkin* v. *Lee* (1980), 78 A.D.2d 180, 434 N.Y.S.2d 300; *Terrell* v. *Garcia* (Tex. Civ. App. 1973), 496 S.W.2d 124, *cert. denied* (1974), 415 U.S. 927, 39 L. Ed. 2d 484, 94 S. Ct. 1434; *Rieck* v. *Medical Protective Co.* (1974), 64 Wis. 2d 514, 219 N.W.2d 242; *Beardsley* v. *Wierdsma* (Wyo. 1982), 650 P.2d 288; see also *Ball* v. *Mudge* (1964), 64 Wash. 2d 247, 391 P.2d 201.

Some of these courts have pointed to the speculative nature of the damages (*E.g., Sorkin* v. *Lee* (1980), 78 A.D.2d 180, 434 N.Y.S.2d 300.) Others have expressed concern for the child who will learn that his existence was unwanted and that his parents sued to have the person who made his existence possible provide for his support. (*E.g., Wilbur* v. *Kerr* (1982), 275 Ark. 239, 628 S.W. 2d 568.) Some courts have decided that requiring the payment of rearing costs would impose an unreasonable burden upon a defendant, unreasonable because it would permit the plaintiffs to enjoy the benefits of parenthood, while shifting all of the expenses to the defendant. That burden, the courts say, is out of proportion to the fault involved. (*E.g., White* v. *United States* (D. Kan. 1981), 510 F. Supp. 146; *Kingsbury* v. *Smith* (1982), 122 N.H. ....., 442 A.2d 1003.) Courts have also stated that allowing such damages would open the door to various false claims and fraud. *E.g., Rieck* v. *Medical Protective Co.* (1974), 64 Wis. 2d 514, 219 N.W.2d 242; *Beardsley* v. *Wierdsma* (Wyo. 1982), 650 P.2d 288.

Too, many courts have declared an unwillingness to hold that the birth of a normal healthy child can be judged to be an injury to the parents. That a child can be considered an injury offends fundamental values attached to human life. This was expressed with some sentimentality in *Public Health Trust* v. *Brown* (Fla. App. 1980), 388 So. 2d 1084. The court, in denying recovery of rearing costs to a woman who alleged that she had became pregnant after a negligently performed tubal litigation said:

> "In holding that such a claim should not be recognized, we align ourselves with a clear majority of courts in other jurisdictions which have decided the identical question [citations].
>
> There is no purpose to restating here the panoply of reasons which have been assigned by the courts which follow the majority rule. * * * In our view, however, its basic soundness lies in the simple proposition that a parent cannot be said to have been damaged by the birth and rearing of a normal, healthy child. Even the courts in the minority recognize, as the jury was instructed in this case, that the costs of providing for a child must be offset by the benefits supplied by his very existence. [Citations.] But it is a matter of universally-shared emotion and sentiment that the intangible but all-important, incalculable but invaluable 'benefits' of parenthood far outweight any of the mere monetary burdens involved. [Citations.] Speaking legally, this may be deemed conslusively presumed by the fact that a prospective parent does not abort or subsequently place the 'unwanted" child for adoption. [Citations.] On a more practical level, the validity of the principle may be tested simply by asking any parent the purchase price for that particular youngster. Since this is the rule of experience, it should be, and we therefore hold that it is, the appropriate rule of law. It is a rare but happy instance in which a specific judicial decision can be based solely upon a reflection of one of

the humane ideals which form the foundation of our entire legal system. This, we believe, is just such a case." 388 So. 2d 1084, 1085-86.

Beardsley v. *Wierdsma* (Wyo. 1982), 650 P.2d 288, is another decision in which the court refused to permit the recovery of rearing costs. In rejecting the notion that would allow the recovery of rearing costs with an offset for the benefits of parenthood, it was observed:

> "We believe that the benefits of the birth of a healthy, normal child outweigh the expense of rearing a child. The bond of affection between child and parent, the pride in a child's achievement, and the comfort, counsel and society of a child are incalculable benefits, which should not be measured by some misplaced attempt to put a specific dollar value on a child's life.
>
> The benefit or offset concept smacks of condemnation law, where the trier of fact determines the value of the land taken by the condemnor. The trier of fact then determines the benefit that results to the land owner, which benefit is deducted from the original value to determine the proper award. If the concept of benefit or offset was applied to 'wrongful birth' actions, we can conceive of the ridiculous result that benefits could be greater than damages, in which event someone could argue that the parents would owe something to the tortfeasors. We think that a child should not be viewed as a piece of property, with fact finders first assessing the expense and damage incurred because of a child's life, then deducting the value of the child's life." 650 P.2d 288, 293.

Similarly, in *Terrell* v. *Garcia* (Tex. Civ. App. 1973), 496 S.W.2d 124, 128, *cert. denied* (1974), 415 U.S. 927, 39 L. Ed. 2d 484, 94 S. Ct., 1434, the court, not without emotion, reasoned:

"[A] strong case can be made that, at least in an urban society, the rearing of a child would not be a profitable undertaking if considered from the economics alone. Nevertheless, as recognized in [*Hayes* v. *Hall* (Tex. Civ. App. 1972), 477 S.W.2d 402, *rev'd* (Tex. 1972), 488 S.W.2d 412] and [*Troppi* v. *Scarf* (1971), 31 Mich. App. 240, 187 N.W.2d 511], the satisfaction, joy and companionship which normal parents have in rearing a child make such economic loss worthwhile. These intangible benefits, while impossible to value in dollars and cents are undoubtedly the things that make life worthwhile. Who can place a price tag on a child's smile or the parental pride in a child's achievement? Even if we consider only the economic point of view, a child is some security for the parents' old age. Rather than attempt to value these intangible benefits, our courts have simply determined that public sentiment recognizes that these benefits to the parents outweigh their economic loss in rearing and educating a healthy, normal child. We see no compelling reason to change such rule at this time." 496 S.W.2d 124, 128.

We consider that on the grounds described the holding of a majority of jurisdictions that the costs of rearing a normal and healthy child cannot be recovered as damages to the parents is to be preferred. One can, of course, in mechanical logic reach a different conclusion, but only on the ground that human life and the state of parenthood are compensable losses. In a proper hierarchy of values the benefit of life should not be outweighed by the expense of supporting it. Respect for life and the rights proceeding from it are at the heart of our legal system and, broader still, our civilization.

In *Wilczynski* v. *Goodman* (1979), 73 Ill. App. 3d 51, our appellate court held that a mother could not recover the expenses of rearing a healthy child in an action that charged a physician with negligence in performing an

abortion. The court, referring to legislation regarding abortion, observed that it is the policy of this State to protect human life. The court declared:

> "In our judgment, a public policy which deems precious even potential life while yet in the womb, at such cost and expense that condition may entail, does not countenance as compensable damage to its parent or parents those additional costs and expenses necessary to sustain and nuture that life once it comes to fruition upon and after successful birth. The existence of a normal, healthy life is an esteemed right under our laws, rather than a compensable wrong." 73 Ill. App. 3d 51, 62.

The reasoning of the court is applicable where an action is brought for a negligent sterilization or a negligent failure to determine pregnancy.

We would observe, too, that it is clear that public policy commands the development and the preservation of family relations. Exemplary of that policy in the tort context is the rule prohibiting suits by children against their parents for negligence. (*Thomas* v. *Chicago Board of Education* (1979), 77 Ill. 2d 165, 171.) To permit parents in effect to transfer the costs of rearing a child would run counter to that policy. As stated earlier, those jurisdictions that permit a recovery for rearing costs have recognized that the recovery should be offset by the measure by which the plaintiffs have been benefited by becoming parents. Two judges of the appellate court panel here appear to favor this view. It can be seen that permitting recovery then requires that the parents demonstrate not only that they did not want the child but that the child has been of minimal value or benefit to them. They will have to show that the child remains an uncherished, unwanted burden so as to minimize the offset to which the defendant is entitled. The court in *Public Health Trust* v. *Brown* (Fla. App. 1980), 388 So. 2d 1084, 1086 n.4, convincingly noted: "The

adoption of that rule [allowing recovery] would thus engender the unseemly spectacle of parents disparaging the 'value' of their children or the degree of their affection for them in open court. It is obvious, whether the conclusion is phrased in terms of 'public policy,' [citation] or otherwise, that such a result cannot be countenanced."

We do not perceive the relevance here of *Griswold* v. *Connecticut* (1965), 381 U.S. 479, 14 L. Ed. 2d 510, 85 S.Ct. 1678, and *Roe* v. *Wade* (1973), 410 U.S. 113, 35 L. Ed. 2d 147, 93 S. Ct. 705, cited by the plaintiffs. In *Griswold* the court invalidated a statute making the use of contraceptives an offense. The court deemed that by outlawing the use of contraceptives the State unnecessarily invaded marital privacy. In *Roe*, the court held that a woman's right to privacy is violated by a statute that prohibits all abortions that are not necessary to preserve the mother's life.

The decisions appear irrelevant to the issue of whether damages may be recovered under the circumstances here for expenses after the birth of the child. The plaintiffs refer to these decisions in opposing considerations of public policy argued by the defendants and relied upon by some of the decisions we have cited. We would note that the plaintiffs themselves, as we shall show, rely upon public policy.

We cannot on balance accept the plaintiffs' contention too that we should rigidly and unemotionally, as they put it, apply the tort concept that a tortfeasor should be liable for all of the costs he has brought upon the plaintiffs. It has been perceptively observed, by distinguished authority, that the life of the law is not logic but experience. Reasonableness is an indispensable quality in the administration of justice. The New York Court of Appeals, in rejecting a claim made in very different context, used language, however, that is not without appropriateness here:

> "While it may seem that there should be a remedy for every wrong, this is an ideal limited perforce by the realities of this world. Every injury has ramifying consequences, like the ripplings of the waters, without end. The problem for the law is to limit the legal consequences of wrongs to a controllable degree." (*Tobin* v. *Grossman* (1969), 24 N.Y.2d 609, 619, 249 N.E.2d 419, 424, 301 N.Y.S.2d 554, 561.)

The reasons given for denying so-called rearing costs are more convincing than the reasons for abstractly applying a rule not suited for the circumstances in this character of case.

As we have noted, the plaintiffs themselves also rely upon considerations of public policy to temper the harshness of a proposed mechanical application of a principle of damages. In general, under the law of damages a plaintiff cannot recover for elements of damage he could reasonably have avoided. (D. Dobbs, Remedies sec. 8.9, at 579 (1973).) It has been said that this avoidable consequences rule might prevent recovery for rearing costs where the parents had an opportunity to avoid parenthood through abortion or adoption. (See *Robak* v. *United States* (7th Cir. 1981), 658 F.2d 471, 479 n.23 (the court stated that physicians in negligent-sterilization cases should not be liable for the costs of rearing a normal child where the plaintiffs learned of the pregnancy within the first trimester and freely chose not to terminate the pregnancy); *Sorkin* v. *Lee* (1980), 78 A.D.2d 180, 434 N.Y.S.2d 300 (the court held that the plaintiffs, suing for a negligently performed vasectomy, could not recover rearing costs, as they did not claim that the physician's negligence prevented them from terminating the pregnancy or that abortion would have been medically dangerous for the mother); *Rieck* v. *Medical Protective Co.* (1974), 64 Wis. 2d 514, 219 N.W.2d 242 (it was contended that plaintiffs should be required to minimize their damages by taking steps to terminate their parental rights).) In contending that the avoidable-consequences rule should

not be applied, it was argued for the plaintiffs in oral argument that applying the rule here would violate a policy, based on natural appreciation and affection, which favors the rearing of children by their natural parents.

The area of law we consider here is new, but there is reason to believe this question and related issues will be presented with increasing frequency. As the decisions we have cited show, courts regard the questions as matters of high social importance, transcending the individual controversies involved.

Dean Prosser recognized that considerations of public policy are of great importance in the law of torts. He commented:

> "Perhaps more than any other branch of the law, the law of torts is a battleground of social theory. Its primary purpose, of course, is to make a fair adjustment of the conflicting claims of the litigating parties. But the twentieth century has brought an increasing realization of the fact that the interests of society in general may be involved in disputes in which the parties are private litigants. The notion of 'public policy' involved in private cases is not by any means new to tort law, and doubtless has been with us ever since the troops of the sovereign first intervened in a brawl to keep the peace; but it is only in recent decades that it has played a predominant part. Society has some concern even with the single dispute involved in a particular case; but far more important than this is the system of precedent on which the entire common law is based, under which a rule once laid down is to be followed until the courts find good reason to depart from it, so that others now living and even those yet unborn may be affected by a decision made today. There is good reason, therefore, to make a conscious effort to direct the law along lines which will achieve a desirable social result, both for the present and for

the future." Prosser, Torts sec. 3, at 14-15 (4th ed. 1971).

For the reasons given, the judgment of the appellate court is reversed and the judgments of the circuit court are affirmed.

Appellate court reversed;
circuit court affirmed.

JUSTICE CLARK, dissenting:

This court today has come to the conclusion that child-rearing costs are not recoverable in a wrongful birth action in Illinois. The court relies primarily on what it sees as a necessary public policy posture in reaching the conclusion it does. However, I believe the court's opinion is internally inconsistent, and I feel that, upon a careful examination, it mischaracterizes the issues without any substantive legal foundation upon which to build. The court inconsistently has said that the birth of a normal child cannot be judged to be an injury to parents and yet, at the beginning of the opinion, the court recognizes that a cause of action exists for wrongful birth in this State, and that plaintiffs can recover for the pain of childbirth, the time lost in having the child, and the medical expenses incurred. The court in effect has found that the birth of a normal child is recognized as an injury in "wrongful birth actions" in Illinois; the issue is what damages are recoverable as a result of that injury to the parents. If, as the court hypothesizes, the birth of a normal child cannot be construed as an injury, how then can the plaintiff recover for the "pain" of childbirth? Should, then, the court characterize the time "lost in having the child" as "lost" time (which in effect is found to be compensable)? Why then allow for the medical costs of childbirth if they represent the first installment in an investment in the preservation and development of family relations? The opinion of the court contradicts itself. Once the court has agreed that the cause

of action for wrongful birth can be brought in Illinois, the policy questions that the opinion grapples with are moot.

The court determines that while other jurisdictions have applied "mechanical logic" in reaching a different conclusion than this court does, such a result can only be reached "on the ground that human life and the state of parenthood are compensable losses." (Slip op. at 6.) Are we then to assume that the courts in Pennsylvania (*Mason* v. *Western Pennsylvania Hospital* (1981), 286 Pa. Super. 354, 428 A.2d 1366), Connecticut (*Ochs* v. *Borrelli* (1982), 187 Conn. 253, 445 A.2d 883), Minnesota (*Sherlock* v. *Stillwater Clinic* (Minn. 1977), 260 N.W.2d 169), and California (*Stills* v. *Gratton* (1976), 55 Cal. App. 3d 698, 127 Rptr. 652), as well as the appellate courts of Michigan (*Troppi* v. *Scarf* (1971), 31 Mich. App. 240, 187 N.W.2d 511), and of this State (*Cockrum* v. *Baumgartner* (1981), 99 Ill. App. 3d 271, *Pierce* v. *DeGracia* (1982), 103 Ill. App. 3d 511) do not respect human life, because those courts find the foreseeable child-rearing expenses to be recoverable in a wrongful birth action? I believe the court has mischaracterized the issue in a most unfortunate and hyperbolic way. It is not at all that human life or the state of parenthood are inherently injurious; rather it is an unplanned parenthood and an unwanted birth, the cause of which is directly attributable to a physician's negligence, for which the plaintiffs seek compensation.

Griswold v. *Connecticut* (1965), 381 U.S. 479, 14 L. Ed. 2d 510, 85 S. Ct. 1678, and *Roe* v. *Wade* (1973), 410 U.S. 113, 35 L. Ed. 2d 147, 93 S. Ct. 705, established that the right to limit procreation was a constitutionally protected right. The United States Supreme Court did not perceive any threat to the sanctity of life by recognizing that a married couple has the right to choose not to procreate. To deny child-rearing expenses effectively nullifies that right by severely impairing the remedy

available to parents who, after choosing not to conceive a child, have found that due to a negligently performed vasectomy they are going to be parents. A couple's decision not to have a child does not undermine the value of a human life. In allowing recovery for damages for child-rearing expenses, we would only be compensating parents for damages that naturally flow from the commision of the tortious act which this court has now recognized.

Nor should the parents be forced to mitigate damages by choosing abortion or adoption. They chose not to conceive a child. It is quite a different situation to ask a couple, once a child has been conceived, to abort, or to put the child up for adoption, indicating that if they failed to do either they would assume full responsibility of any and all costs of that child. If parents are confronted in such a situation with choices that they consider to be unenviable alternatives, they should not be precluded from recovering damages because they select the most desirable of these unpalatable choices. Kelley, *Wrongful Life, Wrongful Birth, and Justice in Tort Law,* 1979 Wash. U.L.Q. 919, 950; see, *e.g., Troppi* v. *Scarf* (1971), 31 Mich. App. 240, 187 N.W.2d 511; *Claphan* v. *Yanga* (1980), 102 Mich. App. 47, 300 N.W.2d 727; *Sorkin* v. *Lee* (1980), 78 A.D.2d 180, 434 N.Y.S.2d 300.

Once a breach of duty by a physician has been established, that tortfeasor must bear the responsibility for the consequences of that action. See *Sherlock* v. *Stillwater Clinic* (Minn. 1977), 260 N.W.2d 169.

It is certainly foreseeable that a physician's failure to properly perform a vasectomy on a husband or failure to properly perform a bilateral tubal cauterization on a wife, would result in the woman's giving birth to an unplanned child. It is also foreseeable that the parents would incur substantial expenses in raising and educating that child.

The court has reached the same result arrived at in the Florida case of *Public Health Trust* v. *Brown* (Fla. App. 1980), 388 So. 2d 1084. The court quotes with approval from that Florida appellate court opinion, where it was said: "[I]t is a matter of universally-shared emotion and sentiment that the intangible but all important, incalculable but invaluable 'benefits' of parenthood far outweigh any of the mere monetary burdens involved." 388 So. 2d 1084, 1085-86.

I feel such an assertion flies in the face of the widespread use of contraceptives today. The court in *Troppi* v. *Scarf* (1971), 31 Mich. App. 240, 253, 187 N.W.2d 511, 517, realized that contraceptives "are used to prevent the birth of healthy children." That appellate court in Michigan also recognized that "[t]o say that for reasons of public policy contraceptive failure can result in no damage as a matter of law ignores the fact that tens of millions of persons use contraceptives daily to avoid the very result which the defendant would have us say is always a benefit, never a detriment. Those tens of millions of persons, by their conduct, express the sense of the community." (31 Mich. App. 240, 253, 187 N.W.2d 511, 517.) I believe that it is fair to say that many prospective parents use birth-control measures in deliberately attempting to avoid the expense of raising a child, because to many of them, at that point in time, the financial costs of feeding, clothing, sheltering and educating a child are prohibitive.

Certainly there are positive aspects to child rearing and enduring benefits to parenthood, but that does not mean, to me, that parents who take measures to prevent the conception of a child should be burdened with all of the expenses that go along with raising that child—expenses that they would not have incurred had it not been for the negligence of another.

I would also follow those other jurisdictions where child-rearing costs, while recoverable, are offset to a

certain degree by the benefits of parenthood. (See *Troppi* v. *Scarf* (1971), 31 Mich. App. 240, 187 N.W.2d 511, *Sherlock* v. *Stillwater Clinic* (Minn. 1977), 260 N.W.2d 169.) Potential benefits, including companionship, that the parents may derive from that parent-child relationship should be considered by the trier of fact in determining the ultimate amount of damages. I do not believe that the many benefits of having a child should be excluded as a matter of law; nor do I feel that such benefits can be held to automatically offset all expenses. Plaintiffs who choose to rear this unplanned child should be allowed to recover for damages according to the degree of the injury. That will inevitably vary. I agree with what the court in *Troppi* v. *Scarf* (1971), 31 Mich. App. 240, 257; 187 N.W.2d 511, 519, said:

> "The essential point, of course, is that the trier must have the power to evaluate the benefit according to all the circumstances of the case presented. Family size, family income, age of the parents, and marital status are some, but not all, the factors which the trier must consider in determining the extent to which the birth of a particular child represents a benefit to his parents. That the benefits so conferred and calculated will vary widely from case to case is inevitable."

The Restatement (Second) of Torts indicates that if damages are to be reduced, the benefit conferred must be to the interest that was harmed:

> "When the defendant's tortious conduct has caused harm to the plaintiff or to his property and in so doing has conferred a special benefit to the interest of the plaintiff that was harmed, the value of the benefit conferred is considered in mitigation of damages, to the extent that this is equitable." (Restatement (Second) of Torts sec. 920, at 509 (1979).)

Thus the trier of fact can be in a more flexible position in determining what is the most equitable award. Application of the so-called "special benefits" rule is appropriate here, for as one commentator stated:

> "Rigid categorization of interests is unnecessary and especially inappropriate in the wrongful birth context in which plaintiffs' reasons for limiting family size are often multifaceted and complex.
>
> • • •
>
> • • • [While] [t]he process would be admittedly difficult for the judge to administer and would require the trier of fact to exercise utmost diligence in balancing benefits and burdens, [it is only through the balancing process that the court] insure[s] that damages are measured as accurately as possible." Note, Tort Damages—Wrongful Birth, 1982 So. Ill. U.L.J. 111, 133-35.

While such a computation in offsetting the benefits that accrue to the parents against the expenses to be incurred is difficult, it is no more formidable a task than determining the amount of damages to be awarded for loss of consortium in a wrongful death action. See *Elliott* v. *Willis* (1982), 92 Ill. 2d 530, 540.

In reaching the result arrived at today, I believe the court has taken a myopic view of prospective parents' considerations. A couple privileged to be bringing home the combined income of a dual professional household may well be able to sustain and cherish an unexpected child. But I am not sure the child's smile would be the most memorable characteristic to an indigent couple, where the husband underwent a vasectomy or the wife underwent a sterilization procedure, not because they did not desire a child, but rather because they faced the stark realization that they could not afford to feed an additional person, much less clothe, educate and support a child when that couple had trouble supporting one

another. The choice is not always giving up personal amenities in order to buy a gift for the baby; the choice may only be to stretch necessities beyond the breaking point to provide for a child that the couple had purposely set out to avoid having. The court today expresses concern about putting a negative imprimatur on a child's life and yet, in denying damages for child rearing, the court may well be accomplishing the very result it seems so intent on avoiding—making a child of an unwanted birth a victim of a very real continuing financial struggle and thus a painful reminder of the obligations of parenthood to a couple who had no appetite for a parental lifestyle. Does that child then become more wanted because this court has seen fit to deny foreseeable expenses in a case where a physician's negligence is undisputed?

JUSTICE SIMON joins in this dissent.

APPENDIX D

ILLINOIS SUPREME COURT
JULEANN HORNYAK, CLERK

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Springfield, Ill. 62706
(217) 782-2035

April 8, 1983

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No. 55733 - Donna Cockrum, et al., etc., et al., appellees, vs. Dr. George Baumgartner, et al. (Dr. George Baumgartner, et al., etc., appellants). Appeal, Appellate Court, First District.

The Supreme Court today DENIED the petition for rehearing in the above entitled cause.

Very truly yours,

/s/ Juleann Hornyak
Clerk of the Supreme Court

83-17

No. 83-77

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

DONNA COCKRUM and LEON COCKRUM,

vs.

DR. GEORGE BAUMGARTNER and UNKNOWN LABORATORY,

Respondents.

and

EDNA RAJA and AFZAL RAJA,

Petitioners,

vs.

MICHAEL REESE HOSPITAL AND MEDICAL CENTER,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Illinois

RESPONDENTS' BRIEF IN OPPOSITION

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RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

These two cases, consolidated by the Illinois Appellate Court, First District for appeal purposes, are medical malpractice actions filed in the Circuit Court of Cook County against a physician and a hospital. In both cases it was alleged that but for certain negligence of the respondents, each of the female petitioners would not have borne a child.

Respondents moved to strike from the lawsuit that portion of the petitioners' prayer for damages seeking recovery of all expenses which would be incurred in raising and educating the unwanted children to adulthood. The Circuit Court of Cook County granted respondents' motions to dismiss and struck the prayer for damages which sought child raising expenses. The other damages sought (pregnancy related expenses) were not challenged.

Petitioners[1] appealed to the Illinois Appellate Court, First District which reversed the granting of respondents' motions to dismiss.

Respondents appealed to the Illinois Supreme Court which held that the expenses incurred in raising and educating the children to adulthood were not recoverable. In so holding, the Illinois Supreme Court noted that it was joining the majority of jurisdictions throughout the United States that have considered the issue. Petition for Writ of Certiorari, pp. 14a-15a. The Illinois Supreme Court relied upon well-recognized public policy considerations in rendering its opinion. Petition for Writ of Certiorari, pp. 18a-20a.

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[1] Petitioners herein, Edna and Afzal Raja were the plaintiffs in one of the two cases consolidated by the Illinois Appellate Court. The plaintiffs in the second case, Donna and Leon Cockrum, have not joined in this petition.

REASONS FOR DENYING THE WRIT

I.

THE ILLINOIS SUPREME COURT'S DECISION PRESENTS NO CONSTITUTIONAL ISSUE

Petitioners' thesis is that the Illinois Supreme Court decision impinges upon a fundamental right secured by the United States Constitution by restricting the right of women to undergo sterilization procedures or abortions. Petitioners' thesis is without foundation.

The Illinois Supreme Court interpreted Illinois tort law and held that certain damages are not recoverable in these medical malpractice cases. The decision of the Illinois Supreme Court is bottomed on an interpretation of Illinois common law and reflects Illinois public policy. The decision merely delineates the spectrum of damages recoverable in a state law malpractice action involving "wrongful birth."

This Court's holdings in *Griswold v. Connecticut*, 381 U.S. 479 (1965) and *Roe v. Wade*, 410 U.S. 113 (1973) as well as analogous holdings in *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Akron v. Akron Center For Reproductive Health, Inc.*, 51 U.S.L.W. 4767 (U.S. June 15, 1983); *Planned Parenthood Association v. Ashcroft*, 51 U.S.L.W. 4783 (U.S. June 15, 1983) and *Simopolous v. Virginia*, 51 U.S.L.W. 4791 (U.S. June 15, 1983) were not challenged in any respect by respondents. They were not, nor could they be, questioned or restricted by the Illinois Supreme Court and are not in conflict in any respect with the decision of the Illinois Supreme Court.

The fact that under Illinois law petitioners have a cause of action for negligent sterilization or a negligent

misdiagnosis of pregnancy, but their recovery does not include the actual costs of rearing and educating petitioners' healthy children does not in any way restrict, prevent or impede petitioners or any other person from obtaining an abortion or a sterilization. The simple fact is that the decision of the Illinois Supreme Court does not in any way deter a woman from exercising her right to become sterile or to have an abortion, but merely delineates the civil damages recoverable if the sterilization or abortion has not been properly performed.

In authoring the decision of the Illinois Supreme Court Justice Ward recognized this fact when he stated:

> "We do not perceive the relevance here of *Griswold v. Connecticut* (1965), 381 U.S. 479, 14 L.Ed.2d 510, 85 S.Ct. 1678, and *Roe v. Wade* (1973), 410 U.S. 113, 35 L.Ed.2d 147, 93 S.Ct. 705, cited by the plaintiffs. In *Griswold*, the court invalidated a statute making the use of contraceptives an offense. The court deemed that by outlawing the use of contraceptives the State unnecessarily invaded marital privacy. In *Roe*, the court held that a woman's right to privacy is violated by a statute that prohibits all abortions that are not necessary to preserve the mother's life.
>
> The decisions appear irrelevant to the issue of whether damages may be recovered under the circumstances here for expenses after the birth of the child. The plaintiffs referred to these decisions in opposing considerations of public policy argued by the defendants and relied upon by some of the decisions we have cited. We would note that the plaintiffs themselves, as we shall show, rely upon public policy." *Cockrum v. Baumgartner*, 95 Ill.2d 193, 202, 447 N.E.2d 385, 390 (1983).

The Illinois Supreme Court decision holds that the parents of an unwanted child *can recover* damages arising out of a negligent sterilization or a negligent

misdiagnosis of pregnancy, but that the actual costs of rearing and educating the allegedly unwanted child cannot be recovered. Petitioners' attempt to cloak this interpretation of Illinois tort law with constitutional ramifications is without merit. Petitioners have failed to establish jurisdiction under 28 U.S.C. §1257(3). Indeed, this Court has previously declined to entertain an appeal in a case involving the identical issue. *Terrell v. Garcia*, 496 S.W.2d 124 (Tex. App. 1973), *cert. den.*, 415 U.S. 927 (1974).

The law is well-settled that the United States Supreme Court will not entertain appeals from State court decisions which rest on adequate and independent state grounds.

> "This Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds. *Murdock v. Memphis*, 20 Wall. (U.S.) 590, 636, 22 L.Ed. 429, 444; *Berea College v. Kentucky*, 211 U.S. 45, 53, 53 L.Ed. 81, 85, 29 S.Ct. 33; *Enterprise Irrig. Dist. v. Farmers Mut. Canal Co.*, 243 U.S. 157, 164, 61 L.Ed. 644, 648, 37 S.Ct. 318; *Fox Film Corp. v. Muller*, 296 U.S. 207, 80 L.Ed. 158, 56 S.Ct. 183. The reason is so obvious that it has rarely been thought to warrant statement. It is found in the partitioning of power between the State and Federal judicial systems and in the limitations of our own jurisdiction. Our only power over State judgments is to correct them to the extent that they incorrectly adjudge federal rights." *Herb v. Pitcairn*, 324 U.S. 117, 125-126 (1944).

As a general rule, the United States Supreme Court will accept as controlling the decision of the State courts upon questions of local law, both statutory and common. *American Railway, Exp. Co. v. Kentucky*, 273 U.S. 269, 272 (1926).

Nowhere has it been held that the right to privacy recognized in *Roe v. Wade*, 410 U.S. 113 (1973) controls or even affects a state's common law with regard to the spectrum of damages available in a malpractice action. On the contrary, it has been held that the right to privacy recognized in *Roe, supra*, "implies no limitation on a state's authority to make a valued judgment favoring child birth over abortion . . ." *Maher v. Roe*, 432 U.S. 464, 474 (1976). The decision of the Illinois Supreme Court rests exclusively on independent state grounds. Petitioners have not demonstrated that it falls within the jurisdiction of this Court.

Even assuming *arguendo* that the decision of the Illinois Supreme Court rested in part on federal grounds, review by this Court would not be justified. Before the United States Supreme Court will review the decision of a state court it must affirmatively appear from the record that whatever federal question is involved was necessary to the determination of the cause by the state court. Where the decision of the state court might have been either on a state ground or a federal ground and the state ground is sufficient to sustain the judgment, the U.S. Supreme Court will not undertake to review it. *Durley v. Mayo*, 351 U.S. 277, 281 (1955).

Consequently, even if a federal question was tangentially involved in this decision, review by this Court should be declined because the state grounds are sufficient to sustain the judgment. In any event, no federal issues are involved either directly, indirectly or inferentially. Accordingly, this Court should deny the petition for writ of certiorari.

II.

THE CONSTITUTIONALITY OF THE ILLINOIS ABORTION ACT IS NOT AN ISSUE IN THIS CASE

In a further attempt to assert an issue of constitutional importance, petitioners cite the Illinois Abortion Act. Ill. Rev. Stat. ch. 38, §81-21 (1979) and attempt to muster a constitutional challenge to that statute. This challenge is not only unfounded, but irrelevant. The Illinois Abortion Act was not relied upon or even cited in the Illinois Supreme Court's decision sought to be reviewed.

Indeed, it is ironic that in their briefs in the Illinois Appellate Court, petitioners relied on the Act and alleged that certain policy statements therein supported their position and claim for relief. (App. Ct. Brief pp. 15-16). Now that their claim for damages has not been allowed to the extent sought, petitioners seek to raise a constitutional challenge to a statute which they relied upon in the Appellate Court and which the Illinois Supreme Court did not even cite. Such an inconsistent position obviously presents no basis for a review by the United States Supreme Court. To the contrary, it is well-established that a petitioner cannot raise for the first time in a petition for writ of certiorari the constitutionality of a statute which the state court did not pass on. *Monks v. New Jersey*, 398 U.S. 71 (1970); *Street v. New York*, 394 U.S. 576 (1969).

CONCLUSION

The Illinois Supreme Court's adoption of a rule of civil damages adopted by a majority of other states presents no constitutional issue for this Court's review. The petition for writ of certiorari should accordingly be denied.

Respectfully submitted,

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